The Honorable Thomas S. Zilly

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SEATTLE TIMES COMPANY, Plaintiff, vs. LEATHERCARE, INC., STEVEN RITT, an individual, and the marital community composed of STEVEN RITT and LAURIE ROSEN-RITT, Defendants and Third Party Plaintiffs, vs. TOUCHSTONE SLU LLC, a Washington limited liability company; TB TS/RELP LLC, a Washington limited liability company; AMERICAN LINEN SUPPLY CO., a Washington corporation; and DOES 1-20, Third Party Defendants.	Case No.: 2:15-cv-01901-TSZ DECLARATION OF JEFFREY ZELIKSON

I, Jeffrey Zelikson, declare and state as follows:

1. I am a Director with Gnarus Advisors LLC, which provides analytic and expert services to businesses, government agencies and law firms facing complex challenges arising from uncertainty, potential litigation, and other disputes. My consulting practice focuses on

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strategic and management consulting and expert assignments related to environmental matters, especially for matters related to management and remediation of hazardous substances. I have had extensive experience across a range of environmental matters, with particular focus on the remediation of hazardous waste sites. I have over 35 years of experience in this particular environmental specialty, dating back to the discovery of the first hazardous waste sites in the country in the late 1970s.

2. Marten Law PLLC, counsel for Plaintiff Seattle Times Company (the "Times") in *Seattle Times Company v. LeatherCare, Inc.*, USDC Western Washington, No. 2:15-cv-01901-TSZ, asked me to evaluate and provide an expert opinion regarding the response actions taken and the costs incurred by the Times associated with the Times' former property located at 307 Fairview Avenue North in Seattle, Washington ("Property"). I am over the age of eighteen and competent to testify as to the facts stated therein.

3. As part of my representation of the Times in this case, I developed an opinion regarding the recoverability under the Model Toxics Control Act ("MTCA") of approximately $0.35 million in costs that the Times incurred to investigate, install, and operate a soil vapor extraction ("SVE") system that the Times operated at the Property between February 2011 and December 2011. To develop this opinion, I evaluated the SVE work to determine if it was the "substantial equivalent" to an interim remedial action conducted by Ecology under MTCA.

4. I have significant experience with MTCA, including evaluating "substantial equivalence." I have provided deposition and trial testimony in MTCA cases and have provided advice to clients regarding MTCA requirements.

5. As discussed in my expert report of April 19, 2017, in order for private parties to recover their costs from another party, they must demonstrate that those costs and associated remedial actions are the substantial equivalent of an Ecology-led or Ecology-supervised action.[1]

[1] Exhibit 1 is excerpts of my April 19, 2017, Expert Report.

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For an action performed under an agreed order with Ecology, this analysis is unambiguous, as by definition it is an Ecology-supervised action.[2] However, for an independent action not supervised or led by Ecology, the party must demonstrate "substantial equivalence".

6. In defining substantial equivalence, MTCA first states that "[i]n determining substantial equivalence, the department anticipates the requirements in this section will be evaluated as a whole and that a claim would not be disallowed due to omissions that do not diminish the overall effectiveness of the remedial action."[3] In other words, while there are requirements which should be followed in demonstrating substantial equivalence, failure to adhere to each and every specific requirement is not intended to prohibit cost recovery.

7. Second, MTCA identifies several elements that should be included in a demonstration of substantial equivalence. Generally, these are:

a. Reporting to Ecology;

b. Lack of objection by Ecology;

c. Reasonable steps to provide public notice;

d. Substantial equivalence with technical standards and evaluation criteria; and

e. Documentation for disposal of hazardous substances.[4]

8. With regard to public notice, MTCA lists several requirements which constitute reasonable steps. These include 1) providing written notice to Ecology, the local health department, the municipality with land use jurisdiction, land owners, and potentially liable persons ("PLPs"); 2) including in said written notice a description of the release being remedied, the schedule, and for potentially liable parties, a statement that they could be held liable for the costs of remedial actions being conducted; and 3) posting a sign at the site visible to the general

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[2] Exhibit 1, p. 017; *see also* WAC 173-340-545(2)(b).
[3] WAC 173-340-545(1).
[4] Exhibit 1, p. 036; *see also* WAC 173-340-545(2)(c).

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public.[5] It should also be noted that for investigations and studies, MTCA requires no advance public notice whatsoever.[6]

9. Regardless of whether or not the above requirements are satisfied, MTCA states that equivalence should not solely be evaluated as a checklist of requirements, but rather evaluated "as a whole", and that actions which achieve a measure of "overall effectiveness" should not be disallowed.[7]

10. With regard to the $0.35 million in costs that the Times incurred to investigate, install, and operate the SVE system, I have evaluated the costs and action under MTCA requirements. Based on that evaluation, I conclude that the action was substantially equivalent to an action conducted or overseen by Ecology.[8]

11. I reach that conclusion by first evaluating the costs and action against each of the five elements identified by Ecology to demonstrate substantial equivalence. The SVE remedial action satisfied the vast majority of the requirements listed under each element.

12. With regard to public notice, the Times took reasonable steps. Specifically, prior to implementing the SVE system, on January 12, 2011 AECOM (project manager for the Times) notified Ecology that 1) a release had been discovered at the site (contamination in soil and perched groundwater), and 2) it planned to install a SVE system to target the highest tetrachloroethylene ("PCE") concentrations at the site. This notification was based on a limited Phase II Environmental Site Assessment that had been conducted in October 2010 by SES (Touchstone's consultant), as well as additional investigation performed by AECOM in December 2010. This letter was also sent to Touchstone, the current land owner.[9]

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[5] Exhibit 1, p. 038; *see also* WAC 173-340-545(3).
[6] Exhibit 1, p. 023, 038; *see also* WAC 173-340-545(3).
[7] Exhibit 1, p. 040.
[8] Exhibit 1, p. 036 – 041.
[9] Exhibit 1, p. 009, 037-038; *see also* AECOM, January 12, 2011 letter to Donna Musa re: Disclosure of Release Discovery, CP_00000976 – CP_00001740, at pages CP_00000976 – CP_00000978, excerpts attached as Exhibit 2.

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13. With regard to notifying other PLPs (such as LeatherCare), I did not consider this to preclude the Times from establishing that the SVE system was substantially equivalent. Contamination was not discovered until October 2010, Ecology was notified in January 2011, and the SVE system was installed in February 2011.

14. Moreover, the SVE system was effective. The SVE system removed approximately 327 pounds of PCE and other volatile organic compounds ("VOCs") from soil, substantially reducing concentrations of PCE in soils.[10] The system reduced soil contaminant levels below the Ecology threshold for dangerous waste, and the results were incorporated into the draft Remedial Investigation for the site. Ultimately, by reducing soil contaminant levels, the SVE system lowered disposal costs for the subsequent remedial action.[11]

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

DATED September 18, 2017.

Jeffrey Zelikson

[10] Exhibit 1, p. 009 – 010. An excerpt from the April 19, 2017, report of LeatherCare's expert, Pam Morrill, agreeing that the SVE system was effective is included as Exhibit 3.

[11] Exhibit 1, p. 037-040. *See also* SoundEarth Strategies, May 2, 2012 Draft Remedial Investigation Report, Troy Laundry Property, FRLN_00038054 – FRLN_00040015, at pages FRLN_00038098 – FRLN_00038100, FRLN_00039015, excerpts attached as Exhibit 4.

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CERTIFICATE OF SERVICE

I hereby certify that on September 18, 2017, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Jo Flannery	flannery@ryanlaw.com
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I declare under penalty of perjury and the laws of the United States of America that the foregoing is true and correct.

DATED September 18, 2017.

s/ Jessica K. Ferrell
Jessica K. Ferrell

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